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Jeffrey S. Wolfe

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I. INTRODUCTION

Many accomplished trial lawyers attribute their courtroom success to an understanding of the use of nonverbal communication as an integral part of trial presentation. The term "nonverbal communication" encompasses a wide range of behaviors including facial expressions, physical gestures, kinesics, proxemics, touch, smell, and paralanguage.[1] For Judge Richard Markus, former Chairman of the Board of the National Institute for Trial Advocacy the importance of nonverbal communication is evident at trial:

> Subliminal perception may be more difficult to plan, but it is equally important for persuasion. Minor variances in presentation persuasively underscore data reliability. Facial expression and other body language ordinarily assert far more than the cold record reveals. *Physical locations of trial participants demonstrate their interrelationships. Proximity imposes control; distance may imply independence or indifference.* Each advocate determines space relationships with the judge, the witnesses, opposing counsel, and the jurors, all subject to judicial control.[2]

An attorney's *courtroom location* has been identified as a significant element of trial presentation. Communication between the lawyer and the jury necessarily depends upon the jury's ability to see and hear the

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* United States Magistrate, Northern District, Oklahoma; B.A., University of California, San Diego, 1973; J.D., California Western School of Law, 1976; LL.M., University of San Diego School of Law, 1990.

1. Elizabeth A. LeVan, *Nonverbal Communication in the Courtroom: Attorney Beware*, 8 L. & PSYCHOL. REV. 83 (1984). The term "kinesics" refers to the use of body movements. *Id.* The term "proxemics" relates to the use of spatial relations and orientation. *Id.* The term "paralanguage" refers to vocal variations in pitch, speech rate, and loudness. *Id.*

2. Richard M. Markus, *A Theory of Trial Advocacy*, 56 TUL. L. REV. 95, 124 (1981) (emphasis added).

attorney. Social science research suggests that the proximity of the lawyer to the jury, and the orientation of the lawyer to or away from the jury, have a direct relation to the intensity of jury perception, thereby affecting the quality of communication. Based upon these observations, and upon conduct of the study reported here, it is evident that an attorney's courtroom location does in fact affect jury perception of lawyer performance.

The crucial relationship between counsel's courtroom location and jury perception of performance has not previously been the subject of objective study. Trial attorneys' intuitive assessments of their own experiences have nevertheless led to a loose understanding of the inherent relationship between location and communication. As a result, the available body of knowledge is largely subjective and dependent upon individual interpretations of trial experiences. However, changes in location, and the movements associated with such changes, are consistently viewed by trial lawyers as important aspects of trial presentation. Controlled changes in location are seen as effective techniques to persuade the jury.

Donald Vinson notes that "an attorney who moves about the courtroom generally will stand out against a background of motionless spectators, witnesses and court officials."[3] However, David Givens distinguishes "simple physical movement," which he characterizes as "dreadfully automatic," from the "deliberate use" of courtroom space "to mark the logical points in an argument and to keep major points structurally distinct from minor ones."[4] Givens asserts that selected locations may operate to enhance or detract from the communication between the jury and the witness.[5] For example, Givens notes that "[b]y standing at the far end of the jury box, [an attorney] can give jurors the sense that the witness is addressing them personally. By asking questions from the farthest opposite corner of the courtroom, [counsel] can show jurors the witness's left profile but deny them significant eye regard."[6]

It is generally agreed that the lawyer should vary his location coincident with the task at hand. Disagreement exists, however, regarding specific locations to be employed during selected phases of trial, particularly during direct and cross examination. There is, however, overall agreement that the goals of direct examination differ from those of cross examination, and that location should vary as a result. Simply stated, an attorney should be positioned in a different area of the courtroom during direct as opposed to cross examination. Therefore, while location is ac-

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3. Donald E. Vinson, *Juries: Perception and the Decision-Making Process*, 18 TRIAL, March 1982, at 52, 54.

4. David B. Givens, *Posture is Power*, 8 BARRISTER, Spring 1981, at 14, 55.

5. *Id.*

6. *Id.*

knowledged to be an important nonverbal factor during both direct and cross examination, the dissimilar goals of each type of examination causes the proper location for each to differ. In both instances, location is essentially viewed as a persuasive factor, such that variance of location has an influential impact on the jury. Nevertheless, these assertions are supported only by empirical observations of trial lawyers who base their conclusions on their own experiences.

Various commentators have taken seemingly inconsistent positions on the issue of courtroom location during both direct and cross examination.[7] Thomas Mauet asserts that the advocate "*should use the available area to the fullest possible extent.*"[8] As such, Mauet proposes two distinct locations for direct examination and cross examination.[9] First, Mauet contends that direct examination should be conducted from a point nearest the far end of the jury box.[10] Mauet's suggested direct examination position is depicted by Figure One below.

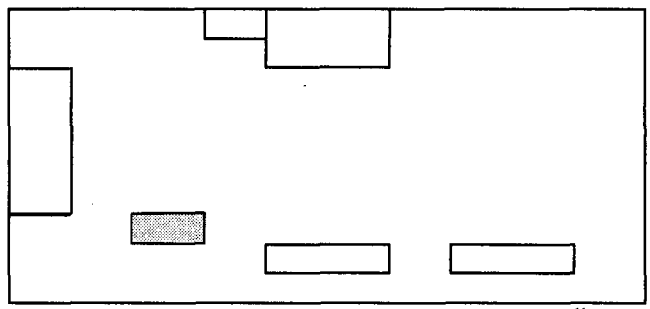

Figure One. Mauet's Location for Direct Examination.[11]

Doing this, says Mauet, has several immediate benefits:

1. It removes you from the jury's line of sight to the witness, thereby eliminating a visual distraction.
2. It allows you to use written notes for the examination without the jury being actively aware of it.
3. It forces the witness to speak up, because he will subconsciously

7. *See infra* notes 8-35 and accompanying text.

8. THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 97 (1980) (emphasis added).

9. *Id.*

10. *Id.*

11. *Id.*

talk loudly enough for you to hear him, thereby assuring that every juror will easily hear his testimony.

4. It forces the witness to look at the jurors, thereby maintaining critical eye contact with them.[12]

Second, Mauet suggests that cross examination should be undertaken from a location nearest the center of the jury box.[13] Mauet's proposed cross examination location is represented in Figure Two below.

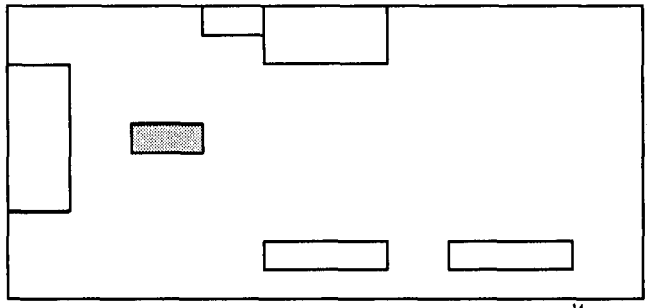

Figure Two. Mauet's Location for Cross Examination.[14]

Mauet asserts that this location allows the attorney to:

> [M]aintain constant eye contact with the witness. In many cases, maintaining eye contact gives the witness the impression that you're totally in command and know when the witness is wavering and hedging in his answers. It also forces the witness to either look at you or avoid your gaze by looking down. This keeps the witness from looking at the jury when he answers your questions.[15]

Michael Colley, however, disagrees with Mauet's perceptions.[16] Colley suggests that during direct examination the lawyer should stand beside the jury as shown in Figure Three below.[17]

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12. *Id.* at 98.
13. *Id.* at 251.
14. *Id.*
15. *Id.*
16. Michael F. Colley, *Principles of Direct Examination*, 2 TRIAL DIPL. J. 13, 17 (Spring 1979).
17. *Id.*

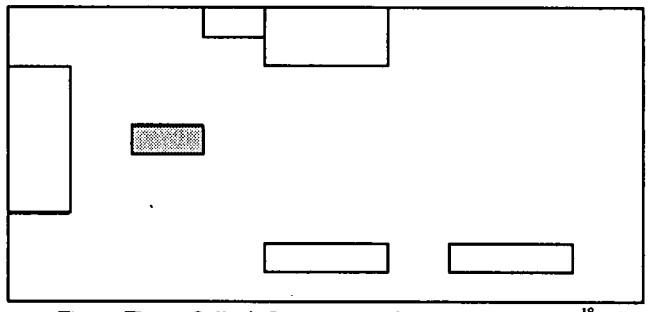

Figure Three. Colley's Location for Direct Examination.[18]

He observes that:

> During direct examination you should stand beside the jury, across the room from the witness, in order to: (1) identify with the jury; (2) focus the jury's attention on the witness; (3) force the witness to look at and speak to the jury; and (4) enhance the importance of the witness by expanding his personal territory in the courtroom . . . . For your own witness you want to non-verbally [sic] create importance, and therefore, you expand his personal territory in the courtroom.[19]

Colley's direct examination location is essentially the same as Mauet's cross examination position. However, the two theories are founded upon entirely different rationales. Conversely, during cross examination, Colley asserts that the lawyer should locate "near the witness" as shown in Figure Four.

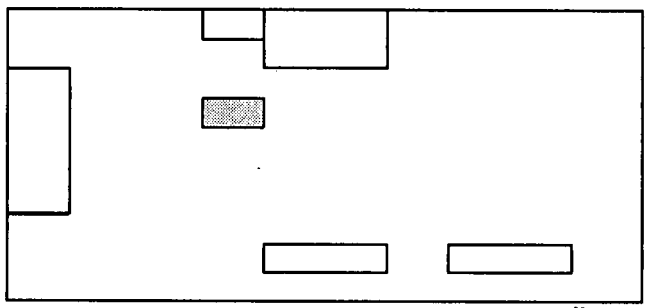

Figure Four. Colley's Location for Cross Examination.[20]

18. *Id.*
19. *Id.*
20. *Id.*

In regard to this position, a position fundamentally different from that of Mauet,[21] Colley states:

> The reverse is true on cross examination when you should stand in front of the jury, near the witness. The reason is: (1) to delimit the witness' importance or status; and (2) to control the witness. *If you challenge the personal territory of the witness on cross examination, you enhance your own status with the jury, and you exercise control, which can be released or regained once it has been established by moving toward or away from the witness.*[22]

James Jeans is less precise, suggesting counsel begin initial inquiry on direct while yet seated, rising as the examination proceeds into the "meaty part," followed by a "sidle over behind the jury box" to let the witness "pitch his responses to the persons that count."[23] Jeans continues by asserting that the attorney should rise as the inquiry proceeds into the "meaty part" of the examination. Finally, Jeans believes that counsel would be best to "sidle over behind the jury box" at key points in the investigation to allow the witness to "pitch his responses to the persons that count."

John Burgess adopts yet an alternate view during cross examination.[24] Burgess suggests closure, or a decrease in proximity between the lawyer and the witness as an appropriate variance in location,[25] thereby creating discomfort in the witness.[26] He further asserts that "[a]pproaching the witness accomplishes two things. First, you invade his territory and that makes him uptight . . . . Gradually approach him, and unnerve him as you get closer to unleashing the zinger on him. Secondly, approaching the witness gives you a chance to observe him closely."[27]

Other commentators voice similar views, and for like reasons. Stephan Peskin notes that the "skilled advocate can raise the anxiety level of those he is cross examining by slowly moving in on the witness," creating a perception "that the witness is nervous and stumbling in his testimony because he is being deceptive."[28] Similarly, Peskin argues that movement must be coordinated "with the verbal message that you are giving the jury."[29] James Herman applies a theatric overlay, noting that "movement and gesture command attention" while cautioning that

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21. *Id.*
22. *Id.* (emphasis added).
23. JAMES W. JEANS, TRIAL ADVOCACY 215-16 (1975).
24. John A. Burgess, *Principles and Techniques of Cross Examination*, 2 TRIAL DIPL. J., Winter 1979, at 19, 23.
25. *Id.*
26. *Id.*
27. *Id.*
28. Stephan H. Peskin, *Non-Verbal Communication in the Courtroom*, 3 TRIAL DIPL. J., Spring 1980, at 8, 9.
29. *Id.*

"movement and gesture should be planned rather than haphazard" and "motivated by the text of the summation."[30] In Herman's view, "the physical relationship between the lawyer and the jury is theatrical rather than intimate," a circumstance that, if forgotten, often produces a "lackluster and flat" performance.[31] Herman adds that this situation can be remedied with "overacting," "bigger movement, gesture, and voice" as if onstage.[32] Janeen Kerper agrees, noting that "[i]t is a cliché among trial lawyers that good trial work is good theater."[33]

Thus, while trial lawyers agree that location affects the trial, there is little agreement about *where* lawyers should be positioned, or *how* courtroom position should vary during the course of trial. Therefore, the fundamental question is whether any difference in jury perception of the lawyer is dependent upon his location in the courtroom. This Article documents a study examining the effect, if any, of location upon jury perception of the lawyer's performance. It should be noted that this study did not explore whether one location is preferable over another, or whether there is a correlation between jury perception of the lawyer and the final verdict. Therefore, this Article does not address the question whether any given location is "better" than another. The purpose of this Article is to address the issue of whether courtroom location *per se* affects jury perception of a lawyer's performance.

II. THE SOCIAL SCIENCES

Communication may be described as an integration of both verbal content and nonverbal cues. Peskin notes that "over sixty percent of the impact or meaning of a communicated message resides in the non-verbal behavior accompanying the oral message."[34] The configuration of the traditional American courtroom places the jury and witness in fixed positions along adjacent walls, facing into a central space or "well" before the bench.[35] In most trial settings, the attorney is free to change his or

30. James Herman, *The Theatre of Summation: Acting, Directing and Playwriting for the Criminal Defense Lawyer*, CALIFORNIA ATT'YS FOR CRIM. JUST. FORUM, Aug. 1984, at 20, 22.
31. *Id.* at 20.
32. *Id.*
33. Janeen Kerper, *Stanislavsky in the Courtroom*, 10 LITIG., Summer 1984 at 8.
34. Peskin, *supra* note 28, at 8.
35. *See infra* Figure Five.

her location within the boundaries of the "well," "enjoying a unique freedom of movement in the courtroom."[36]

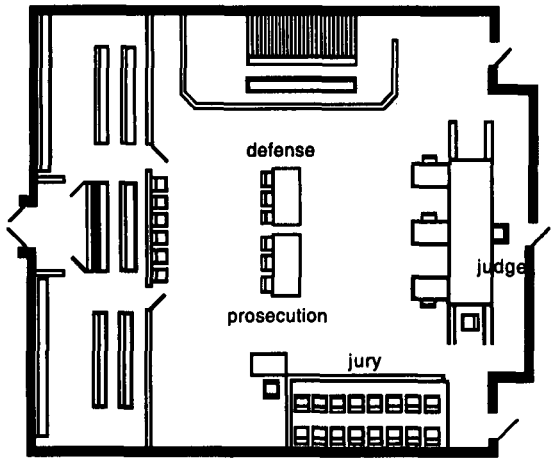

Figure Five. The Traditional American Courtroom Plan.[37]

Although considered significant by most trial lawyers, the effect of such movement is relatively undocumented by objective research in courtroom interaction. However, recent studies in the social sciences suggest that location, expressed in terms of both *distance* and *orientation*, affects interpersonal communication.

A. Distance

Social science research has identified an undeniable link between distance and the effectiveness of communication. Anthropologist Edward Hall describes man's view of space and distance as dynamic, in that it relates to action, or what can be done in a given space rather than what is seen by passive viewing.[38] Hall describes man as "surrounded by a series of expanding and contracting fields which provide information of many kinds."[39] Each field, or zone, is linked with communication behaviors, such that certain behaviors are acceptable within the zone while

36. John M. Conley, et al., *The Power of Language: Presentational Style in the Courtroom*, 1978 DUKE L.J. 1375, 1378 n.12.

37. *See* Allan Greenberg, *Selecting a Courtroom Design*, 59 JUDICATURE 422, 424 (1976).

38. EDWARD T. HALL, THE HIDDEN DIMENSION 101 (1982).

39. *Id.* at 115.

others are not.[40] Hall identifies four zones, each with a near and far phase: "intimate distance," "personal distance," "social distance," and "public distance."[41]

"Intimate distance," which measures from six to eighteen inches is described as that distance at which the presence of another is unmistakable and may, at times, be overwhelming because of greatly stepped up sensory inputs.[42] At this distance, Hall observes, both persons involved are uniquely aware of either physical contact or the high possibility of physical involvement.[43] Within this distance, vocalization plays a minor role, if any, in the communication process because, at this distance, communication is primarily conducted through other sensory channels.[44] Adult middle-class Americans consider the use of this distance improper.[45]

"Personal distance" is the distance that consistently separates the members of "non-contact species."[46] Hall designates this distance as from one and a half to two and a half feet in the near phase, and from two and half feet to four feet in the far phase.[47] "Personal distance" is often described as a protective bubble or sphere that circumscribes a zone of close communication characterized by a point "just outside easy touching distance."[48] This distance, Hall notes, marks the outer limit of physical domination—a point at which one is easily able to see fine details of skin, hair and clothing, yet a zone of limited permission.[49] For example, a wife can stay within her husband's personal zone with impunity, but for another woman to do so is an entirely different matter.[50]

"Social distance," in its close phase, measures from four to seven feet, and extends from seven to twelve feet in its far phase.[51] Hall observes that "impersonal business occurs at this distance" with greater involvement in the close phase than in the far phase.[52] "Social distance" is a

40. *Id.*
41. *Id.* at 116.
42. *Id.* at 116.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.* at 120.
49. *Id.*
50. *Id.*
51. *Id.* at 122.
52. *Id.*

common distance for persons attending a casual social gathering and is the frequent distance used during normal work routine.[53] Social distance has further implications for the courtroom. Hall notes, "To stand and look down at a person at this distance has a disconcerting effect, as when a man talks to his secretary or receptionist."[54]

Prolonged contact at less than ten to twelve feet when one person is standing and the other seated "tires the neck muscles and is uncomfortable for those seated, who must, as a result, crane their necks to continue eye contact."[55] Contact within social distance, but at greater than ten feet offers opportunity for disengagement. Hall cites the example of a secretary positioned less than 10 feet from another, who, because of the distance, will be sufficiently involved to be virtually compelled to converse, even with a stranger.[56] If the secretary is at a greater distance, the secretary can work quite freely without having to talk.[57]

"Public distance," in its close phase, is between twelve and fifteen feet.[58] Hall describes public speaking at this distance as "formal" and observes that speakers often assume a formal style, carefully choosing their words and phrasing sentences.[59] "Public distance," in its far phase, measures from twenty-five feet outward.[60] At this range, communication seems "automatically set around important public figures."[61] Hall notes that at this distance "most actors know that the subtle shades of meaning conveyed by the normal voice are lost, as are details of facial expression and movement."[62]

Based upon Hall's findings, it is plain that impersonal business, such as that undertaken in the courtroom, takes place at social distances, at least as far as the jury is concerned. Proceeding at less than social distance is likely to engender an adverse reaction, a useful fact with respect to selected trial encounters. Hall implies that the acceptance of influence is curvilinearly related to distance. The existence of differing spatial zones, each delineating discrete communication behaviors, creates the potential for a blend of interactions among courtroom participants, with both positive and negative outcomes.

Stuart Albert and James Dabbs, Jr. assert that certain spatial zones are appropriate for certain kinds of communication.[63] Albert and Dabbs note

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53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.* at 123.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. Stuart Albert & James M. Dabbs, Jr., *Physical Distance and Persuasion*, 15 J.

that when a communicator is outside the appropriate spatial zone, the effectiveness of the communication is decreased "through such processes as distraction from the content of the message itself, the arousal of defensive reactions, the attribution of manipulative intent to the speaker, or the listener's inference that the speaker is treating him in a negative manner ranging from discontent to disdainful avoidance."[64] To test their assertion, they established three distances: near distance that measured from one to two feet, middle distance that measured from four to five feet, and far distance that measured from fourteen to fifteen feet.[65] At each distance, they presented a group of listeners with either friendly or hostile speakers communicating two five-minute messages.[66] Upon conclusion, Albert and Dabbs found evidence of Hall's spatial zones, noting that attention to message content was greatest at the medium distance, and that at the near and far distances attention was directed away from message content toward the physical appearance of the speaker.[67]

Robert Kleck hypothesized that statements of opinion made by one member of a twosome (dyad) are more likely to elicit non-verbal indicators of agreement at highly proximate interaction distances than when similar statements of opinion are made at less proximate interaction distances.[68] After videotaping subjects, Kleck found that the mean incidence of head-nodding was more than twice that for the near distance than for the far—13.4 versus 6.6—a result strongly supporting his original hypothesis.[69]

Experimental analysis has shown that the tendency of an individual to comply with demands of another is in part related to the distance that separated the two persons.[70] Accordingly, a person is more likely to conform to a proximate source of compliance pressure.[71] On that basis, social scientists have postulated that "something akin to fields of force, diminishing in effectiveness with increasing psychological distance," may explain the greater potency to compliance pressure under highly proxi-

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PERSONALITY AND SOC. PSYCHOL. 265 (1969).

64. *Id.* at 265.

65. *Id.* at 266.

66. *Id.*

67. *Id.* at 267-70.

68. Robert E. Kleck, *Interaction Distance and Non-Verbal Agreeing Responses*, 9 BRITISH J. SOC. AND CLINICAL PSYCHOL. 180, 181 (1970).

69. *Id.*

70. *Id.* at 180.

71. *Id.*

mate conditions.[72] Similarly, studies examining the perceptions of friendliness related to distance have concluded that increasing distance produces ratings of less acquaintance, less friendliness, and, correspondingly, less talkativeness, while decreasing distance has the opposite result.[73]

Howard Rosenfeld sought to isolate nonverbal behavior in interpersonal relations and demonstrate the effect of distance in communication.[74] Rosenfeld asked students to enter a room and nonverbally demonstrate to a person already seated that they were either friendly or unfriendly.[75] The experiment established that distance was a critical factor.[76] The average distance between the student decoy and the subject in the *approval-seeking condition* was fifty-seven inches, as contrasted with an average distance of ninety-four inches in the *avoidance condition.*[77]

B. Orientation

Hall observes that:

> Man's feeling about being properly oriented in space runs deep. Such knowledge is ultimately linked to survival and sanity. To be disoriented in space is to be psychotic. The difference between acting with reflex speed and having to stop to think in an emergency may mean the difference between life and death—a rule which applies equally to the driver negotiating freeway traffic and the rodent dodging predators.[78]

Accordingly, Hall concludes that man has created material expressions of territoriality as well as visible and invisible territorial markers that he terms fixed-feature space.[79] Fixed-feature space consists of either fixed or permanent features similar to those found in the courtroom.[80]

Research shows that the orientation of objects within a given space changes one's behavior.[81] One experiment showed that the longer patients remained in the geriatric ward, the less talkative and increasingly introverted they became.[82] Based on observation of patient interaction, the pattern of interpersonal relations seemed to largely depend upon the

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72. *Id.*
73. Nancy Russo, *Connotation of Seating Arrangements*, 2 CORNELL J. SOC. REL. 37-44 (1967).
74. Howard M. Rosenfeld, *Effect of an Approval-Seeking Indication on Interpersonal Proximity*, 17 PSYCHOL. REP. 120, 120-21 (1965).
75. *Id.*
76. *Id.*
77. *Id.*
78. HALL, *supra* note 38, at 105.
79. *Id.* at 103.
80. *Id.*
81. *Id.*
82. *Id.*

arrangement of the furniture.[83] The number of conversations across a corner, when persons were seated at right angles to one another, was double that as when persons were seated side-by-side, and three times as frequent as those across the table.[84] The addition of smaller tables and re-arrangement of chairs produced dramatic results.[85] When each bed was assigned its own table thus allowing individuals to "territorialize" the space, the number of conversations doubled while reading tripled.[86]

In related research, Robert Sommer asked students to choose seating arrangements about a square table on the basis of the relationship with their companion.[87] When asked to be cooperative, fifty-one percent chose side-by-side seating.[88] When asked to be competitive, forty-one percent chose to sit diametrically opposed to one another, across the table.[89] When simply conversing, forty-two percent chose to sit diagonally across from one another.[90] A similar study, conducted employing round tables, yielded similar results.[91] Eighty-three percent chose to sit side-by-side when asked to cooperate, while sixty-three percent chose to sit the farthest distance from one another, across the diameter of the table, when told to be competitive.[92]

In later studies, involving both distance and orientation, Sommer asked students from the United States, England, Holland, Sweden and Pakistan to rank thirty-seven arrangements of pairs seated at square, round and rectangular tables.[93] Students ranked these arrangements along a scale from "very intimate and psychologically close" to "very distant and psychologically remote."[94] Sommer reported identical results from all groups.[95] Side-by-side seating was always rated the most intimate, followed by corner seating (across the diagonal), and face-to-face (across from one another) seating.[96]

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83. *Id.*
84. *Id.* at 109.
85. *Id.*
86. *Id.*
87. ROBERT SOMMER, PERSONAL SPACE: THE BEHAVIORAL BASIS OF DESIGN 62 (1969).
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.* at 63.
93. *Id.* at 64.
94. *Id.*
95. *Id.*
96. *Id. See* SOMMER, *supra* note 87, at 64.

One clear effect of orientation is the ability to see the actor. Depending upon one's orientation in a given room, a speaker may or may not be within sight. Studies have shown that persuasion depends, to a significant degree, upon nonverbal cues communicated by sight as well as sound.[97] In a study aimed at testing the effect, if any, of nonverbal body language, researchers videotaped an actor "discussing" evidence of a mock case using "confident" body language, "doubtful" body language and "neutral" body language.[98] The tapes were then shown to jurors as part of a mock trial exercise and jurors were asked to complete verdict forms setting forth the extent of their agreement with the speaker.[99] The results showed that agreement significantly related to the confidence expressed in body language.[100] In fact, the "confident" posturing received the greatest agreement.[101]

Similarly, W. Gill Woodall and Judee Burgoon tested the effects of verbal messages, both synchronized and unsynchronized, with body gestures on the receivers of such messages.[102] They found that verbal messages that are highly synchronized combined with kinesic cues are more persuasive than verbal messages desynchronized with kinesic cues.[103] Woodall and Burgoon also found that the source was less credible when using dissynchronized message cues than when using cues synchronized with message content.[104] Other studies confirm the importance of the jury's ability to see the lawyer. One study, conducted using moderately attractive and unattractive communicators, found that a physically attractive communicator is more persuasive.[105] Another study, examining the effect of personal appearance, focused on style of dress.[106] One presenter was deviant-appearing, wearing jeans, a beard and long hair (a "hippie"), while the other was conventional-appearing, wearing a tie and jack-

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97. *See* Lawrence J. Leigh, *A Theory of Jury Trial Advocacy*, 1984 UTAH L. REV. 763, 796 (citing Catha Maslow et al., *Persuasiveness of Confidence Expressed Via Language and Body Language*, 10 BRIT. J. CLINICAL PSYCHOL. 234, 235-38 (1971)).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. LeVan, *supra* note 1, at 95 (citing W. Gill Woodall & Judee K. Burgoon, *The Effects of Nonverbal Synchrony on Message Comprehension and Persuasiveness*, 5 J. NONVERBAL BEHAV. 207 (1981)).

103. *Id.*

104. *Id.*

105. *Id.* (citing Shelly Chaiken, *Communicator Physical Attractiveness and Persuasion*, 37 J. PERSONALITY & SOC. PSYCHOL. 1387 (1979)).

106. *See id.* at 96 (citing Joel Cooper et al., *On the Effectiveness of Deviant and Conventional-Appearing Communicators: A Field Experiment*, 29 J. PERSONALITY & SOC. PSYCHOL. 752 (1974)).

et, was clean shaven and had short hair.[107] Both presented the same argument in an attempt to persuade householders to favor a state income tax.[108] The results showed that the deviant-appearing presenter was more persuasive, the theory being that individuals delivering unexpected messages are more persuasive than individuals delivering expected messages.[109] In other words, the householders did not expect an articulate, well-reasoned argument from the hippie, but were persuaded for that very reason.[110] From these results, LeVan suggests that an attorney might want to present a strong and logical argument, but switch from a more conservative look to a "more colorful and casual look" to violate the jurors' expectations and thus be more persuasive.[111]

C. Spatial Dynamics

Hall describes the term proxemics as a manifestation of microculture with three aspects: fixed-feature space, semifixed-feature space and informal space.[112] Fixed-feature space is defined as a material extension of territoriality and "one of the basic ways of organizing the activities of individuals and groups."[113] Fixed-feature space refers to the spatial organization of objects within a given space.[114] The spacial organization is both expressive and determinative of communication and behavioral patterns that occur within the space.[115] In Hall's view, "the important point about fixed-feature space is that it is the mold into which a great deal of behavior is cast."[116] A courtroom is a primary example of fixed-feature space.

Studies further suggest that behavior relating to a physical setting is dynamically organized.[117] A change in any component of the setting has varying degrees of effect on all other components in that setting, thereby

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107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.* at 97.
112. HALL, *supra* note 38, at 103.
113. *Id.* at 103.
114. *Id.*
115. *Id.*
116. *Id.* at 106.
117. ENVIRONMENTAL PSYCHOLOGY: MAN AND HIS PHYSICAL SETTING 38 (Harold M. Proshansky et al. eds., 1970).

changing the characteristic behavior of the setting as whole.[118] These studies clearly imply that physical location within a given space affects behavior.[119] David Stea hypothesizes that changing the "defining characteristics" of territory changes the behavior that occurs within it.[120] Stea concludes that human movement within a territory is closely related to the "general problem of topographical orientation (location . . . etc.)."[121] He further notes that orientation has been described as a function of two sensory spatial cues: sense of direction and sense of distance.[122]

Sim Van der Ryn, leading an architectural research team, analyzed the relationships between courtroom form and function.[123] Van der Ryn explained that most functional problems that occur in existing courtrooms result from poor vision, hearing and movement.[124] He concluded that the "traditional courtroom plan can be greatly improved simply by altering the locational arrangement of the actors."[125] Therefore, Van der Ryn clearly suggests that location *per se* is a determining factor in perception within the courtroom.

D. Summary

The configuration of the traditional American courtroom fixes the location of all parties except the lawyer. Only the lawyer may choose where he will stand and what relationship he will thereby assume with respect to the other participants. Behavioral research suggests that variations in both distance and orientation influence perception and establish a context to characterize substantive communication. The ability to see and hear the lawyer, and the intensity of the communication, depends upon the lawyer's location relative to the jury. Therefore, the ability of the lawyer to communicate with the jury depends on the physical relationship between the two—a relationship defined by the actors' orientation to and the distance from one another. As such, location is a significant nonverbal factor that affects communication in the courtroom.

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118. *Id.*

119. *Id.* at 39-40.

120. David Stea, *Space, Territory and Human Movements, in* ENVIRONMENTAL PSYCHOLOGY: MAN AND HIS PHYSICAL SETTING 37, 39, 41 (Harold M. Proshansky et al. eds., 1970).

121. *Id.*

122. *Id.* at 41.

123. Sim Van der Ryn, *An Analysis of Courtroom Design Criteria*, 52 JUDICATURE 150, 151 (1968-69).

124. *Id.*

125. *Id.* at 155.

III. THE STUDY—ASSUMPTIONS

This Article reports the results of an independent study investigating the questions whether courtroom location *per se* impacts jury perception of lawyer performance. Sections III through V set forth the parameters and the results of the study.

A. General Assumptions

The following general assumptions were made in conducting the study and interpreting its results:

1. All of the "lawyers" were student lawyers who had completed the same "Lawyering Skills II" course.[126] As such, it was assumed that the lawyers possessed the minimal trial skills necessary to authenticate the conduct of the mock trials, and therefore, the trials were close approximations of actual litigation.

2. No lawyer or team possessed so much greater experience than another as to significantly affect the results of the study.

3. Each trial involved the same facts, witnesses and exhibits.[127] Therefore, it was assumed that individual variations were not so great as to skew the results of the survey of jurors in any given trial. In this regard, participants were instructed, among other things, to appropriately dress for their roles during trial.

4. It was also assumed that the fact that students knew they were participating in a study related to physical location in the courtroom did not otherwise affect their actions, except within the parameters of the study. In other words, it was assumed that the results of the study would *not* have changed had the students *not* known of the details of the study.[128]

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126. "Lawyering Skills II" is an upper level trial practice course, then taught at the University of San Diego School of Law, during the spring 1985 semester.

127. *See infra* notes 133-34 and accompanying text for a description of the trial dynamics.

128. This assumption may be comfortably made because (1) students were only asked to confine themselves to a given courtroom location and not otherwise change their presentations and (2) the trial itself was, in effect, a "final examination," being the final activity of the course. Hence, the study *per se* was not uppermost in students' minds. Indeed, several students commented that they *did not* participate because they felt there might be some adverse effect on their final grade for the course because of perceived limitations placed upon them in the conduct of their trials. Fortunately, only a few students felt this way, and, as shown from the results,

5. An individual's total visual field extends across 150 degrees,[129] with an arc of comfortable vision of 60 degrees.[130]

6. An individual's auditory range for a normal speaking voice is within thirty-two feet in front of the sound source and within an angle of 140 degrees.[131]

B. Assumptions of Trial Dynamics[132]

The following assumptions are made of trial dynamics:

1. During examination of a witness, the witness will generally look at the lawyer while responding to questions.

2. Adversarial theory holds that during direct examination the witness and the jury should have good eye contact and voice communication.[133]

3. During direct examination the lawyer should not become the witness, such that the witness's testimony is lost in the lawyer's presence. The witness should be placed "center-stage" in order for the lawyer to be effective. It is the witness who seeks to persuade, and the lawyer is persuasive only through the witness's testimony.

4. During cross examination, the better examination strives to break jury-witness eye contact, otherwise negating the positive effects created during direct examination.

5. During cross examination, the lawyer should occupy "center-stage"

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a clear majority of students elected to participate.

129. *See* ABA-AIA JOINT COMM. ON THE DESIGN OF COURTROOMS AND COURT FACILITIES, THE AMERICAN COURTHOUSE, PLANNING AND DESIGN FOR THE JUDICIAL PROCESS 25-26 (1973) [hereinafter AMERICAN COURTHOUSE].

130. *See* ALLAN GREENBERG, AMERICAN BAR ASS'N COMM'N ON STANDARDS OF JUDICIAL ADMIN., COURTHOUSE DESIGN: A HANDBOOK FOR JUDGES AND COURT ADMINISTRATORS 45 (1975).

131. *See* AMERICAN COURTHOUSE, *supra* note 129, at 27. *But see* GREENBERG, supra note 130, at 45. Greenberg defined "the limit of clear hearing during speech in a low voice[, or] the zone of private hearing," as "a distance of nine feet in front of the speaker and six feet on either side" of the speaker. *Id.* Greenberg further defined "the zone of clear hearing during speech with a normal unamplified speaking voice" as "a distance of thirty-four feet in front and twenty-two feet on either side of a speaker." *Id.*

132. Certain assumptions are made regarding preferred actions of the lawyer and behavior of the witness during both direct and cross examination. However, these assumptions do not pertain directly to the results of the study because the narrow issue of the inquiry is simply whether location has a *per se* affect on juror perception of the lawyer during trial. The results are not refined to the extent that conclusions can be drawn regarding juror perception during different aspects of trial.

133. See, e.g., AMERICAN COURTHOUSE, supra note 129, at 25. In the AMERICAN COURTHOUSE, the authors observe that "[a]n additional visual consideration is the distance and angle of vision within which facial expressions can be clearly seen, as the ability to observe a person's expression helps in understanding what he says." *Id.*

such that it is the lawyer, and not the witness, who is persuasive.

IV. METHOD

A. Assignment of Location (Conditions)

Four locations were identified in the traditional American courtroom. These four locations are set forth in Figure Six below.

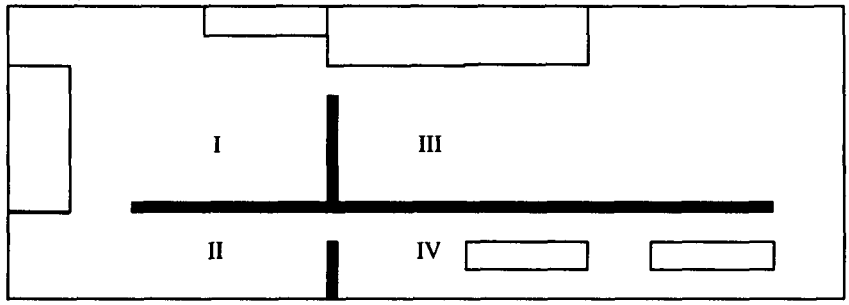


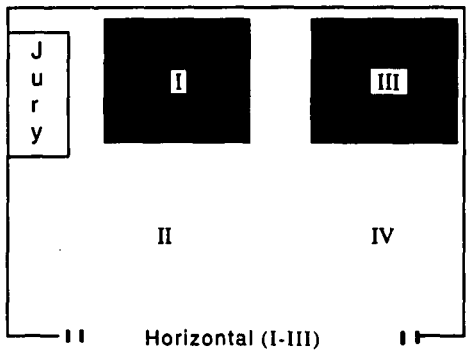
Figure Six. The Four Quadrant Locations.

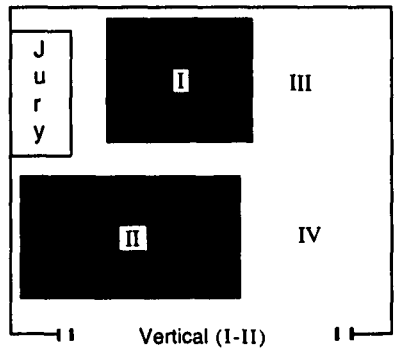
Lawyers were paired against their opponents in horizontal, vertical, or diagonal (cross) locations with respect to one another in each trial. Table One lists the six resulting quadrant pairings.

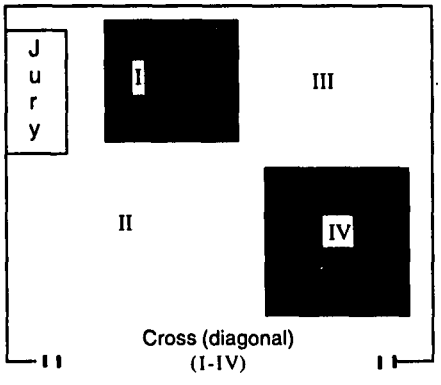
Table One - Quadrant Pairings

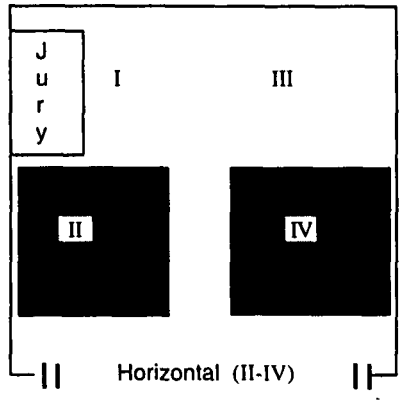
Horizontal	Vertical	Cross (Diagonal)
I - III	I - II	I - IV
II - IV	III - IV	II - III

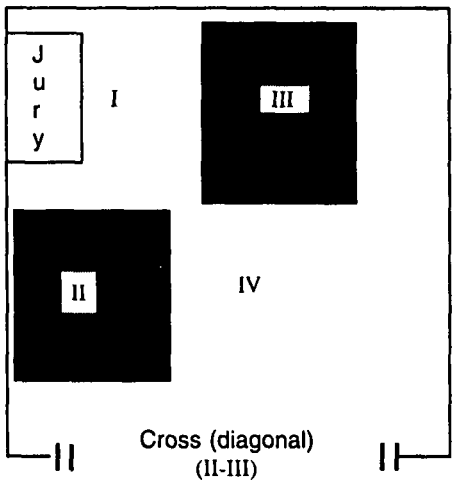
The resulting locations of lawyers in the courtroom during this study are shown as follows:


Jury
I
III
II
IV
Horizontal (I-III)


Jury
I
III
II
IV
Vertical (I-II)


Jury
I
III
II
IV
Cross (diagonal)
(I-IV)


Jury
I
III
II
IV
Horizontal (II-IV)


Jury
I
III
II
IV
Cross (diagonal)
(II-III)

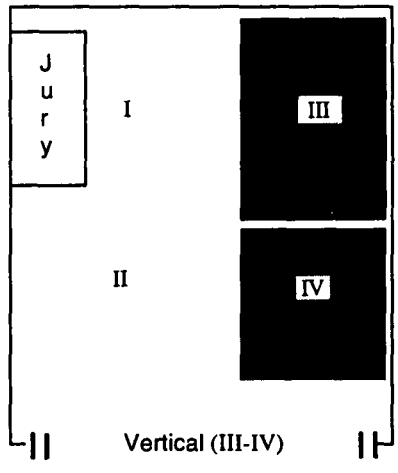

Jury
I
III
II
IV
Vertical (III-IV)

Table Two below shows placement of prosecution and defense lawyers by quadrant, per trial. Both prosecution and defense lawyers appeared in all quadrant locations. Locations of defense and prosecution lawyers for each quadrant pairing were reversed to minimize bias inherent in either the prosecution or defense cases. For example, when lawyers were assigned a vertical pairing with locations in Quadrants I and II, two trials were conducted where the prosecution appeared in Quadrant II and the defense in Quadrant I; and two were conducted reversing locations, the prosecution in Quadrant I and defense in Quadrant II (i.e., V3/V7 and V5/V6, as shown in Table Two). The same procedure was followed for horizontal and diagonal pairings.[134]

Table Two
Quadrant Placement of Student Lawyers

		Defense Quadrants			
		I	II	III	IV
Prosecution Quadrants	I		V5 V6	H5	C4 C6 C7
	II	V3 V7		C8	H6
H - Horizontal	III	H2 H3	C1 C2		V1
V - Vertical					
C - Cross (Diagonal)	IV	C3 C5	H1 H4	V2 V4	

The lawyers were positioned in different locations during each trial to enable jurors to compare the performances of two disparately situated attorneys in one courtroom. As a result, data was reported for forty-two presentations by student lawyers (two locations per trial over twenty-one trials) acting as either prosecution or defense counsel. Of these presen-

134. Seven trials were conducted where the lawyers were paired vertically (V1 through V7), six with horizontal pairings (H1 through H6), and eight where the lawyers were paired diagonally across from one another (C1 through C8).

tations, twelve were made from Quadrant I, ten from Quadrant II, nine from Quadrant III, and eleven from Quadrant IV.[135] Additionally, pairing opposing lawyers in differing positions enabled examination of the issue of whether location of opposing counsel affects jury perception.

B. Design Concepts

1. Proximity

Quadrants I and II are equally proximate to the jury, as are III and IV. Quadrants I and II are more proximate than III and IV, while distance from the jury varies between I and IV and between II and III.

2. Orientation

While the lawyer is able to maintain eye contact with the jury in Quadrant I, the lawyer in Quadrant II is behind the jury and, as a result, unable to maintain eye contact. Quadrant III is equivalent to Quadrant I, being directly opposite the jury. Quadrant IV requires jurors to turn their heads to see the lawyer. Therefore, three different orientations are found in the traditional American courtroom, represented by Quadrants I and III (in front of the jury), Quadrant II (behind the jury), and Quadrant IV (to the side of the jury).

3. Witness Effects

A lawyer located in Quadrants I or II causes the witness to look toward the jury during examination, while a lawyer in Quadrants III or IV causes the witness to look away from the jury.

C. Participants and Procedure

Eighty-four second and third year law student lawyers who enrolled in the "Lawyering Skills II" course participated as trial counsel in twenty-one mock trials.[136] Following the completion of each trial, a total of 131 jurors were surveyed prior to joint deliberation.

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135. Six presentations each were made by student lawyers acting as both prosecution and defense counsel in Quadrant I. Four presentations were made by prosecutors in Quadrant II, while defense lawyers made six from that same location. Five presentations were made by prosecutors, and four by defense counsel in Quadrant III. Six presentations were made by prosecutors, and five by defense attorneys from Quadrant IV.

136. A total of twenty-seven trials were conducted. Student lawyers in six trials declined to participate, and as such, those results were excluded from the study.

Parameters of the study required student lawyers to remain in their assigned courtroom location at least eighty percent of the time. However, the lawyers were instructed that they could move freely within their assigned quadrant location. Quadrant locations were assigned prior to trial and confirmation of locations was made immediately before each trial began. Each student lawyer received a diagram of the courtroom with his or her location clearly marked. Throughout the course of each trial, visual checks were made to confirm appropriate location and no significant deviations were noted. Jurors, student lawyers and judges were surveyed upon completion of each trial and prior to jury deliberation. All questionnaires were collected prior to deliberation.

D. Evaluation of Performance

Lawyer performance was rated by three types of participants: jurors, student lawyers and judges.

1. Jurors

Jurors were asked to complete a questionnaire containing thirty-one questions. Embedded within the questionnaire were two types of inquiry. One type asked jurors to choose between opposing lawyers, and the second asked them to rate individual lawyers on a scale of from 1.0 to 7.0, 1.0 being the lowest and 7.0 being the highest, without regard to their opponent.

When asked to choose between opposing counsel, jurors were asked which lawyer seemed more *in control, powerful, dominant,* and *theatrical.* Jurors were also asked to choose based on their perceptions of appearances of *comfort, rapport* and *better communication.* When asked to rate individual lawyers, jurors were asked to rate performance in terms of *persuasion, control* and *ability to relate to the witness.*

2. Student Lawyers

Student lawyers were asked to evaluate their own experiences by completing a questionnaire containing eighteen questions. Two types of questions were presented. First, lawyers were asked to choose between themselves and their opponents, as well as respond to objective questions about their location. Second, they were asked to rate both their performance and the performance of their opponent. Lawyers were asked to choose between themselves and their opponents in terms of *power* and *dominance.* They were also asked to choose *who had the better "quad-*

rant assignment," and whether they felt *location in the courtroom made a difference in the trial of the case.* When asked to rate performance, lawyers were asked to rate themselves and their opponents in terms of *control* and *persuasion.* They were also asked to rate themselves in terms of *communication* and *rapport.*

3. Judges

Judges were asked a total of twelve questions. As with jurors and student lawyers, judges were asked to choose between opposing lawyers in terms of *control, persuasion, command, rapport* and *power.* Judges were also asked to select the lawyers making the *more effective direct examinations* and *cross examinations.* They were not asked to rate individual performance.

V. RESULTS

The results are expressed in terms of juror and student lawyer responses to questionnaires completed at the conclusion of each trial. For reasons set forth below, the results of the judges' questionnaires were disregarded for purposes of this study. Questionnaire results for jurors and student lawyers are set forth in separate sections and condensed in a concluding summary.

A. Jurors

Jurors were asked two types of questions at the conclusion of each trial. The first type asked jurors to individually rate performance of either the prosecution or defense lawyers, scoring them on a scale of from 1.0 to 7.0. The second type of question asked jurors to choose between opposing lawyers selecting one over the other as more powerful, dominant, controlling, or commanding.

Jurors rated individual lawyers in Quadrants I and II higher than those in Quadrants III and IV.[137] Lawyers located in Quadrant I were given the highest overall scoring. When asked to choose between lawyers, jurors consistently selected lawyers in Quadrant I over lawyers located in either Quadrants II, III, or IV.[138] When opposing lawyers were located in quadrants other than Quadrant I, jurors selected lawyers in Quadrant II over those located in Quadrant III,[139] jurors selected lawyers located in Quad-

137. *See infra* Tables Three, Four, and Five.
138. *See infra* Tables Seven, Eight, and Nine.
139. *See infra* Table Ten.

rant III over those in Quadrant IV,[140] and lawyers in Quadrant IV were chosen over those located in Quadrant II.[141] A detailed summary of juror responses to each type of question is set forth below.

B. Juror Rating of Individual Lawyers

When the jurors rated the student lawyers' individual performances, the responses reflected significant differences in juror perception, depending upon the lawyers' location. Table Three illustrates these results.

Table Three
Summary of Mean Scaled Juror Responses by Quadrant

	I	II	III	IV
Persuasion-Direct	5.2	4.6	4.7	4.4
Persuasion-Cross	4.6	4.4	4.0	4.1
Communication	4.2	4.2	3.9	3.9
Control	4.8	4.3	4.0	4.3
Ability to Relate	4.9	4.5	4.2	4.6
Mean Totals	4.7	4.4	4.1	4.2

Table Four emphasizes the importance of the advocate's location by highlighting the differences in jury perception of the student lawyers' *persuasion* and *control.*

140. *See infra* Table Twelve.
141. *See infra* Table Eleven.

Table Four
Mean Juror Rating of Persuasion and Control by Quadrant

	I	II	III	IV
Persuasion-Direct	5.2	4.6	4.7	4.4
Persuasion-Cross	4.6	4.4	4.0	4.1
Control	4.8	4.3	4.0	4.3
Mean Totals	4.9	4.4	4.2	4.2

Table Five reflects similar results in juror perception of the student lawyers' *communication skills* and *ability to relate to the witness.*

Table Five
Mean Juror Rating of Communication and Ability to Relate

	I	II	III	IV
Communication	4.2	4.2	3.9	3.9
Ability to Relate	4.9	4.5	4.2	4.6
Mean Totals	4.6	4.4	4.1	4.2

As anticipated, the responses suggest that juror perception of the lawyer varies with the lawyer's location in the courtroom. The results show that lawyers in Quadrant I are rated more highly than lawyers appearing in other quadrants. The greatest differential is shown in response to juror perception of *persuasion during direct examination,* while the least disparity is found in juror perception of *communication.*

C. Juror Selection as Between Opposing Lawyers Located in Different Quadrants

Juror responses to questions requiring them to select between the prosecutor and defense counsel were equally significant. As in earlier responses, those lawyers in Quadrant I were given preference. Table Six summarizes cumulative selection of lawyers indicating by percentage the number of times a lawyer was selected in a given quadrant over his or her opponent. The percentages were computed by totaling the number of

juror responses to a given question (e.g., "control") for all trials in which either the defense or the prosecution appeared in a given quadrant. For example, lawyers appeared in Quadrant I a total of twelve times.[142] The number of juror responses for all twelve trials was totaled and a percentage obtained based upon the number of times lawyers in Quadrant I were selected. The same procedure was employed for each of the remaining three quadrants.

Table Six
Cumulative Percentage of Lawyers Selected by Quadrant

	I	II	III	IV
Command	62.0%	44.4%	32.5%	50.0%
Control	62.2%	52.3%	39.4%	39.2%
Dominance	66.0%	43.0%	45.0%	44.0%
Power	60.0%	54.5%	42.5%	42.0%
Communication	65.3%	58.1%	40.0%	36.0%
Rapport	68.0%	50.0%	45.0%	36.0%
Theater	51.0%	51.2%	25.0%	68.0%
Cumulative Mean	62.9%	52.1%	38.5%	45.0%

Jurors consistently selected the attorneys located in Quadrant I (62.9%) when asked to choose between lawyers in that location and counsel in another courtroom location. In response to questions of *control* and *rapport*, jurors selected the lawyers in Quadrant I significantly more often than lawyers in other locations (68.2% and 68.0% respectively). Similarly, jurors found the lawyers in Quadrant I to be *more dominant* (66.0%) and better able to *communicate* (65.3%) than the attorneys located elsewhere.

Conversely, jurors found those student lawyers in Quadrant IV to be more *theatrical.* In terms of theatrical performance, jurors selected those

142. *See supra* Table Two.

lawyers in Quadrant IV sixty-eight percent of the time. However, this result may, in-part, be explained by the less precise term "theatrical" used in the evaluation questionnaire.[143] Alternately, the lawyers in Quadrant IV, being the greatest distance from the jury, may have acted in a more exaggerated fashion, thus causing the jury to perceive them as *more theatrical*, but otherwise less effective in terms of command, control, dominance, communication and rapport.

Tables Seven through Twelve examine jury responses to lawyers appearing in the locations described by the paired quadrant configurations set forth in Table One. The results show that jurors selected the lawyers located in Quadrant I, on average, more frequently than lawyers located in other quadrants. The results also show a hierarchy of juror preference dependent upon the lawyer's location, such that if neither attorney is found in Quadrant I, juror selection of lawyers relates, at least in part, to their respective locations in the remaining three quadrants.

Table Seven shows the results of juror preference as between lawyers in Quadrants I and II.

Table Seven
Juror Preference as Between Lawyers Opposing One Another in Quadrants I and II

	I	II
Control	44.4%	55.6%
Command	90.0%	10.0%
Dominance	61.1%	38.9%
Power	50.0%	50.0%
Communication	58.8%	41.2%
Rapport	66.7%	33.3%
Theater	58.8%	41.2%
Cumulative Mean	61.4%	38.6%

143. Eliminating "Theater" from the Cumulative Mean produces the following results: Quadrant I (64.9%), Quadrant II (50.3%), Quadrant III (40.7%), and Quadrant IV (41.2%). These figures clearly demonstrate the predominance of the near locations over the far locations. Of these, Quadrant I is plainly a preferred location over the others, including the near location identified by Quadrant II.

As between Quadrants I and II, the results indicate that lawyers in Quadrant I were selected more frequently than were lawyers who opposed them in Quadrant II (a cumulative mean of 61.4% versus 38.6%). Responses varied when jurors were asked which lawyer had more control. Jurors responded that attorneys in Quadrant I (55.6%) had more control than their opponents in Quadrant II (44.4%). All other responses demonstrate a preference for lawyers located in Quadrant I.

Table Eight shows the results of juror preference as between lawyers located in Quadrants I and III.

Table Eight
Juror Preference as Between Lawyers Opposing One Another in Quadrants I and III

	I	III
Control	63.6%	36.4%
Command	66.7%	33.3%
Dominance	54.5%	45.5%
Power	63.6%	36.4%
Communication	72.7%	27.3%
Rapport	63.6%	36.4%
Theater	54.5%	45.5%
Cumulative Mean	62.7%	37.3%

The results show that lawyers located in Quadrant I were selected more often than those in Quadrant III (cumulative mean percentages of 62.7% versus 37.3%). Juror response was uniform, such that lawyers located in Quadrant I were always selected more often than those in Quadrant III, despite the question asked.

Table Nine sets forth the results of juror preference as between lawyers located in Quadrants I and IV.

Table Nine
Juror Preference as Between Lawyers Opposing One Another in Quadrants I and IV

	I	IV
Control	76.2%	23.8%
Command	59.1%	40.9%
Dominance	76.2%	23.8%
Power	66.7%	33.3%
Communication	66.7%	33.3%
Rapport	71.4%	28.6%
Theater	42.8%	57.2%
Cumulative Mean	65.6%	34.4%

Results show that the lawyers appearing in Quadrant I were preferred over those located in Quadrant IV (cumulative mean percentage of 65.6% versus 34.4%). In response to the question, "Which lawyer appears more theatrical," jurors selected those lawyers in Quadrant IV over those in Quadrant I (57.2% versus 42.8%). However, this result may be attributable to "overacting" by less proximate counsel in Quadrant IV or to ambiguity in the term "theatrical."

Table Ten presents the results of juror preference as between opposing lawyers located in Quadrants II and III.

Table Ten
Juror Preference as Between Lawyers Opposing One Another in Quadrants II and III

	II	III
Control	76.9%	23.1%
Command	76.9%	23.1%
Dominance	61.5%	38.5%
Power	76.9%	23.1%
Communication	84.7%	15.3%
Rapport	76.9%	23.1%
Theater	76.9%	23.1%
Cumulative Mean	75.8%	24.2%

The results demonstrate juror preference for the more proximate attorney, located in Quadrant II, over the more distant attorney, in Quadrant III (cumulative mean percentages of 75.8% versus 24.2%).

Table Eleven shows juror preference as between opposing lawyers located in Quadrants II and IV.

Table Eleven
Juror Preference as Between Lawyers Opposing One Another in Quadrants II and IV

	II	IV
Control	23.1%	76.9%
Command	38.5%	61.5%
Dominance	30.8%	69.2%
Power	38.4%	61.5%
Communication	53.8%	46.2%
Rapport	46.2%	53.8%
Theater	38.5%	61.5%
Cumulative Mean	38.5%	61.5%

The results indicate that jurors selected attorneys located in Quadrant IV more frequently than those opposing them in Quadrant II (cumulative mean percentages of 61.5% versus 38.5%). Juror responses were almost evenly divided when jurors were asked to choose which lawyer communicated better with the jury (53.8% for Quadrant II versus 46.2% for Quadrant IV). In this category, lawyers in the more proximate Quadrant II location were deemed to have better communication than their opponents in the more distant Quadrant IV location.

Table Twelve shows juror preference as between opposing lawyers located in Quadrants III and IV.

Table Twelve
Juror Preference as Between Lawyers Opposing One Another in Quadrants III and IV

	III	IV
Control	37.5%	62.5%
Command	56.3%	43.7%
Dominance	50.00	50.0%
Power	62.5%	37.5%
Communication	68.7%	31.3%
Rapport	68.8%	31.2%
Theater	12.5%	87.5%
Cumulative Mean	60.7%	39.3%

The results indicate that jurors selected the lawyers in Quadrant III more often than their opponents in Quadrant IV (a cumulative mean percentage of 60.7% in versus 39.3%). Exceptions are found in response to "control" and "theater," inquiries in which jurors selected lawyers in Quadrant IV over those in III.

D. Student Lawyers

Student lawyers were asked three questions. First, they were asked to rate themselves and their opponents on a scale from 1.0 to 7.0 based upon their respective courtroom locations. Second, student lawyers were asked to compare themselves to their opponents and choose who had the "better" courtroom location, who was more powerful, and who was more dominant. Last, they were asked to report the percentage of time spent during trial in their assigned quadrant location.

1. Individual Performance Rating

Student lawyers were asked to rate themselves and their opponents based upon their respective courtroom locations, on a scale of from 1.0 to 7.0, on the following: (a) persuasion during direct examination and

throughout the trial; (b) control during cross examination; (c) communication with the jury and as between the witness and the jury; and (d) rapport with the jury. Tables Thirteen and Fourteen set forth individual performance ratings by student lawyers of themselves (Table Thirteen) and of their opponents (Table Fourteen).

Table Thirteen

Individual Performance Ratings by Student Lawyers of Themselves

	I	II	III	IV
Persuasion During Direct	5.5	4.7	5.3	4.1
Control During Cross	5.3	4.5	4.8	3.5
Persuasion During Trial	4.75	4.79	4.87	4.75
Communication With Jury	5.0	5.1	5.25	4.6
Lawyer Relate With Jury	4.87	4.83	5.10	4.37
Witness Relate With Jury	4.6	5.25	4.7	4.8
Rapport With Jury	4.6	5.2	4.5	3.95
Witness Communication	5.16	5.2	5.37	4.45
Mean	4.97	4.94	4.98	4.31

Scale: 1.0 ("Not Very Well") to 7.0 ("Very Well")

Table Fourteen
Individual Performance Ratings by Student Lawyers of Their Opponents

	I	II	III	IV
Persuasion During Trial	5.45	4.45	4.34	4.16
Control During Cross	3.8	4.45	4.43	4.6
Mean	4.6	4.45	4.38	4.38

Scale: 1.0 ("Not Very Well") to 7.0 ("Very Well")

Lawyers in Quadrants I, II, and III rated themselves similarly regardless of location. Lawyers in Quadrant IV, however, rated themselves lower than their opponents located in the other three locations.[144] Thus, with the exception of lawyers in Quadrant IV, lawyers in Quadrants I, II and III, generally perceived themselves as equally capable, regardless of courtroom position. Lawyers in the least proximate location from the jury, however, rated themselves less favorably than those located in other quadrants.

When asked to compare themselves with their opponents in other locations, the results show that lawyers in Quadrant I perceived themselves as better positioned than lawyers in other locations.[145] When asked to rate their opponents, the student lawyers rated them hierarchically, similar to the ratings of lawyer performance by jurors. Lawyers located in Quadrant I rated their opponents more favorably than lawyers located elsewhere. Lawyers in Quadrant II rated their opponents more favorably than those in Quadrants III and IV, while those located in Quadrants III and IV rated their opponents equally.[146] Lawyers in the more proximate locations of Quadrants I and II thus rated their opponents more highly than lawyers appearing in the less proximate locations of Quadrants III and IV.

144. *See supra* Table Thirteen.
145. *See infra* Table Fifteen.
146. *See supra* Table Fourteen.

2. Student Lawyer Preference as Between Themselves and Their Opponents

The lawyers were asked to compare themselves to their opponents and choose between themselves and their opponents in three areas: (1) Who had the better quadrant location; (2) Who was more dominant during trial; and (3) Who was more powerful during trial. The results are presented in Table Fifteen below.

Table Fifteen
Lawyer Preference as Between Themselves and Their Opponents

	I	II	III	IV
Who had best location?	1.3	1.4	1.5	1.6
Who was more dominant?	1.1	1.3	1.3	1.5
Who was more powerful?	1.2	1.7	1.3	1.7
Mean	1.2	1.46	1.36	1.6

Scale: 1.0 ("We Did" or "We Were") to 2.0
("My Opponents Did" or "My Opponents Were")

Lawyers located in Quadrant I rated themselves as having the "best location," being "more dominant," and "more powerful" as compared with their opponents in the other locations. Lawyers in Quadrant IV rated themselves as having the least desirable courtroom locations as compared to their opponents, and as being least dominant and powerful.

3. Does Courtroom Location Make a Difference?

Student lawyers were asked whether they felt that their courtroom location made "a difference in the trial of the case." The lawyers' responses indicated that courtroom location did make a "difference in trial." These results are presented in Table Sixteen below.

Table Sixteen
Student Lawyer Assessment of Whether Courtroom Location Made a Difference in Trial

	I	II	III	IV
Does courtroom location matter?	1.0	1.0	1.1	1.4

Scale: 1.0 ("Yes, Location Made a Difference") to 2.0 ("No, Location Made No Difference")

Lawyers in each location responded that courtroom location made a difference in trial. Responses were more nearly uniform in Quadrants I and II, the more proximate quadrants, than in Quadrants III and IV.

4. Time in Location

On average, student lawyers reported spending between eighty and eighty-nine percent of trial time in their assigned quadrant locations. These figures reaffirm the validity of the results of the question studied—juror perception of attorney performance based upon variation in location.[147]

G. Judges

Due to the brevity of the inquiry made of trial judges, these responses are discussed separately.[148] Unlike the student lawyers, the judges were not made privy to the precise nature of the experimental undertaking, though they were advised that a study was being conducted.

However, unlike either the jurors or the student lawyers, the judges rated the students' substantive performance as part of their individual course grade. Thus, while judges served as such for the trial, they also served as "instructors" charged with both the management of the trial and grading of student lawyers. This latter, and perhaps more dominant activity, may account for judicial results that are largely inconsistent,

147. Prosecution lawyers reported spending eighty-five to eighty-nine percent of their time in assigned locations while defense lawyers reported spending slightly less, from eighty to eighty-four percent of their time within their assigned locations.

148. The judges were not asked to rate individual lawyer performance, but only choose between lawyers.

both as between judges and when compared with responses of jurors and student lawyers.

The judges' questionnaire consisted of twelve questions that required the judge to choose between defense and prosecution lawyers in various categories.[149] An analysis of the results failed to reveal a pattern or trend that supported or negated the thesis of the study. Instead, of the 252 possible responses (twenty-one questionnaires multiplied by the number of questions), only sixty favored the prosecution lawyers. Of these "prosecution-oriented" responses, no more than eight of a possible twenty-one were registered, among all judges, in response to any single given question. Therefore, no discernable pattern was evident related to lawyer placement or location within the courtroom. Accordingly, no support may be garnered from the judicial responses that is meaningful considering the surveys conducted of jurors and student lawyers. The question, however, is whether an inconclusive result, by itself, is meaningful.

A further review of the judicial responses leads to a conclusion that the responses are not meaningful. Of overwhelming significance is the fact that the majority of judicial responses favored defense lawyers, regardless of quadrant position.[150] This result is likely attributable to the fact that each question called for an "*either/or*" response, such that "Defense Lawyers" were always choice "A" and "Prosecuting Lawyers" were always choice "B." In effect, the judicial questionnaire was not tailored, as were the jurors' and student lawyers', to account for testing anomalies, as most probably surfaced with the judges.

In sum, the judges may have been concerned with other issues such as course grading, the two-hour trial time limit, and similar administrative issues, rather than the substance of the trial itself. As such, the judges may not have been receptive to the evidence *per se*, such that they formed any substantive opinion about the case or attorney conduct. Indeed, all judges received a complete copy of the "case scenario" before trial, including summaries of witness testimony and exhibits to be presented. In comparison, the jurors, who were the primary respondents in the instant study, received no advance information.

For these reasons, the judicial responses have been disregarded as inconclusive. This result may actually bear some correspondence with

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149. These categories included *persuasion*, *power*, *control*, *command* and *rapport* among others. In essence, the judges' questionnaires repeated the inquiries made of the jurors and the student lawyers.

150. One hundred forty responses favored the defense while only sixty favored the prosecution. Fifty-two judicial responses were split, meaning that two judges, judging different trials where the parties were located in the same quadrants, responded opposite from one another.

the reactions of actual judges in real trials. On the other hand, this result may be nothing more than the result of an unartfully constructed questionnaire combined with the educational duties and pressures imposed upon the judges in this mock trial setting.[151]

H. Summary of Results

Juror rating of individual attorney performance varied consistently with the proximity of the lawyer to the jury box. Lawyers in Quadrants I and II were rated more favorably than lawyers located in Quadrants III and IV. Similarly, when asked to compare and choose between opposing attorneys, jurors consistently selected attorneys located in Quadrant I over attorneys located in either of the other quadrants. Lawyers located in Quadrant I, being most proximate to the jury, and being positioned to have full eye contact with jurors, were preferred over lawyers located in other areas of the courtroom. When lawyers did not appear in Quadrant I, but opposed one another in two of the three remaining quadrants, jurors chose lawyers located in Quadrant II over those in Quadrant III; those located in Quadrant III over lawyers in Quadrant IV; and lawyers located in Quadrant IV over those located in Quadrant II.

Juror preference for lawyers located in Quadrant I over those located elsewhere is likely explained by the greater proximity of the lawyer to the jury and consequent heightened intensity of sensory inputs, including eye contact and audition. This proposition is confirmed by juror ratings of individual lawyers in Quadrants I and II as higher than the ratings given to lawyers located in Quadrants III and IV. Quadrants I and II were more proximate to the jury than Quadrants III and IV, and therefore, proximity may be viewed as a key factor in jury perception. Jurors also expressed preference for lawyers in Quadrant II over those in Quadrant III, lawyers positioned in Quadrant II being more proximate than those located in Quadrant III. Similarly, jurors preferred lawyers located in Quadrant III for those in Quadrant IV with Quadrant III being the more

151. It is interesting to note that Harry Kalven and Hans Zeisel found that "in a surprisingly large number of cases the judge rates counsel as equal and thus establishes that for three fourths of the criminal trials no problem of a serious imbalance of counsel exists." HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 354 (1971). Thus, while the results of the judges in the present study were inconclusive, such results may be the norm with regard to the judicial role. In other words, in a jury trial, the judge is not to be "persuaded" in the same manner as the jury, hence the judge does not ordinarily reach conclusions as to the superiority of one lawyer over another *per se*.

proximate location. However, this pattern was not followed when lawyers opposed one another in Quadrants II and IV. Notwithstanding that Quadrant II is more proximate to the jury than Quadrant IV, jurors selected lawyers in Quadrant IV over those located in Quadrant II, indicating that yet another factor, other than proximity to the jury box, affects juror perception.

VI. DISCUSSION

The study's basic hypothesis was that a lawyer's location in the courtroom affects juror perception of the lawyer. This hypothesis was supported by the data that the study generated.

A. Pattern of the Results

The pattern of both juror and student lawyer responses indicated that the lawyer's location in the courtroom affected juror perception of lawyer performance. Jurors consistently selected attorneys located in Quadrant I, the closest to the jury box, over lawyers in the remaining three locations. Student lawyers in the near location responded that they, and not their opponents, had the better courtroom position. Similarly, lawyers in all locations reported that attorney location in the courtroom made a difference in the trial. Lawyers in the nearer locations, Quadrants I and II, responded more strongly than those located in Quadrants III and IV.

Jurors rated individual lawyers in Quadrant I more favorably than lawyers in the remaining three locations.[152] However, jurors perceived lawyers in the far location, Quadrant IV, as the most "theatrical." Jurors expressed preference for lawyers in Quadrant II over those in III,[153] and those in Quadrant III over lawyers in Quadrant IV.[154] Quadrant II is more proximate to the jury than Quadrant III and Quadrant III is more proximate to the jury than Quadrant IV. The pattern of juror preference thus appears linked to the proximity of the lawyer in relation to the jury.

This pattern was not observed in those trials in which the lawyers opposed one another from Quadrants II and IV.[155] In those trials, jurors preferred lawyers in Quadrant IV, the far location, to those of attorneys located in Quadrant II. This result may be a function of the fact that jurors can see lawyers in Quadrant IV and not in Quadrant II, thus miti-

152. *See supra* Tables Seven, Eight, and Nine.
153. *See supra* Table Ten.
154. *See supra* Table Twelve.
155. *See supra* Table Eleven.

gating to a degree the greater proximity of lawyers in Quadrant II. Alternately, applying Sommer's findings, lawyers in Quadrant IV may be characterized as oriented "side-by-side" with the jury, while lawyers in II may be said to be "behind" them. Proximity may thus be mitigated by orientation, when, as here, orientation "side-by-side" creates a more favorable communication pattern than does the more proximate, yet "behind" or "diametrically opposed" location. Nevertheless, the overall mean scores placed Quadrants I and II, as "near locations," ahead of Quadrants III and IV in juror ratings of individual lawyer performance.[156]

B. Selected Juror Responses

Proximity to the jury clearly affected juror perception of the lawyers' ability to effectively *communicate.* Lawyers in Quadrants I and II were rated higher (4.2 on a scale of 1 to 7) than lawyers in Quadrants III and IV (3.9).[157] Similarly, jurors chose lawyers in Quadrant I more often than lawyers located in other quadrants (65.3%) as better able to communicate with the jury. Lawyers in Quadrant II were chosen next most frequently (58.1%), followed by lawyers in Quadrant III (45.0%). The lawyers in the least proximate location, Quadrant IV, were selected with the least frequency (36.0%).[158]

The foregoing results are consistent with juror response to *rapport.* Lawyers in the more proximate locations were identified more frequently as having "better rapport" with the jury than those in less proximate locations. Lawyers located in Quadrant I were selected by jurors as having "better rapport" with the jury 68% of the time. Lawyers in Quadrant II were chosen 50% of the time, with lawyers in Quadrants III and IV being selected only 45% and 36% of the time respectively.

In responses to questions asking who was more in *control,* more *dominant,* more in *command* and more *powerful,* jurors chose those lawyers in Quadrant I 68.2%, 66.0%, 62.0% and 60.0% of the time respectively, over lawyers positioned in other locations. Selection of lawyers in Quadrants I and II exceeded 50% in response to questions of *control* and *power.* At the same time, selection dropping below 40% (39.3%) for *control* and below 45% (42.2%) for *power* in Quadrants III and IV.[159] These results

156. *See supra* Table Three.
157. *See supra* Table Three.
158. *See supra* Table Six.
159. *See supra* Table Six.

support the thesis that proximity affects juror perception of attorney performance.

C. *Selected Student Lawyer Responses*

Student lawyers in Quadrant I identified themselves as having the "best courtroom location" when asked to compare themselves with their opponents in other locations.[160] Similarly, lawyers in Quadrant I responded that they, and not their opponents, were *more dominant* and *more powerful.* Conversely, students in the least proximate location, Quadrant IV, reported that *their opponents* enjoyed better locations and were *more powerful* and *more dominant.* These responses confirm the juror responses, such that lawyers in the more proximate locations rate themselves more highly than those in locations less proximate to the jury. Interestingly, lawyers, when asked simply to rate themselves without comparison to their opponents, rated themselves equally when positioned in Quadrants I, II and III. Lawyers in Quadrant IV rated themselves significantly lower, perhaps indicating an expectation that theirs was not the better courtroom location.[161]

D. *Analysis*

Of the four courtroom locations identified in the present study, jurors reported that the most proximate of the four positions, Quadrant I, stood out as the location from which lawyers were perceived as having greater effect than their opponents. Similarly, lawyers also reported that they believed they were better able to present their case from Quadrant I. Similar results were found with regards the next most proximate location, Quadrant II, and after that, in order, Quadrants III and IV. Generally, those lawyers in the more proximate locations were identified by jurors more often than lawyers located in the less proximate locations. Likewise, individual lawyers in more proximate locations were generally rated higher than their opponents located in less proximate positions. The exception occurred when lawyers located in Quadrant II were paired against lawyers located in Quadrant IV. In those cases, lawyers in Quadrant IV were selected by jurors over their colleagues in Quadrant II.

Proximity to a speaker has been found to affect both attention to message content and persuasion.[162] Greater proximity enhances sensory inputs and intensifies communication.[163] Research has also shown that the

160. *See supra* Table Fifteen.
161. *See supra* Table Thirteen.
162. *See generally,* Kleck, *supra* note 69.
163. *See generally,* HALL, *supra* note 39.

ability to see the speaker and to judge body language has a significant affect on juror decision-making.[164] Studies in persuasion have identified a number of objective, nonverbal characteristics associated with a "credible" speaker, including eye contact, gestures, moderate relaxation, moderate to slightly faster than average speaking rate, and fluency and conversational delivery style.[165] Conversely, anxiety and nervousness are characteristic of the "unpersuasive."[166]

A recent study demonstrated that juror perception of a judge's facial expressions influenced the jury's verdict.[167] The researchers concluded that "judges tend to leak through subtle nonverbal channels their beliefs or expectations regarding information not available to the jury."[168] They found that a judge's expectations for the outcome of the trial predict the judge's verbal and nonverbal behavior and that this behavior also relates to the verdicts returned by juries.[169]

The near locations in the instant study were defined by Quadrants I and II. A lawyer located in Quadrant I enabled jurors and counsel to maintain eye contact with one another at close distance. The lawyer was proximate to a majority of the jury, standing immediately adjacent to the jury rail. Conversely, lawyers located in Quadrant II, while clearly more proximate to the jury than lawyers in Quadrants III and IV, were virtually out of sight, positioned at the rear of the jury box. The ability of the jury to see the lawyer and to maintain eye contact was significantly curtailed in this location. Additionally, proximity to the jury varies, given the traditional configuration of the jury box, essentially placing only two jurors immediately next to the lawyer standing at the rear of the box.

The far locations were defined by Quadrants III and IV. Lawyers in Quadrant III were still in full view of the jury, but, unlike lawyers in Quadrant I, were removed from the immediate proximity of the jury, thus reducing the intensity of contact.[170] Lawyers in Quadrant IV were positioned behind counsel tables, thus removed from the immediate view of the jury, requiring jurors to turn their heads away from the witness to see the lawyer. Lawyers in this location were least proximate to the jury,

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164. *See* Leigh, *supra* note 98, at 796.
165. *Id.*
166. *Id.*
167. Peter D. Blanck et al., *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89, 150-51 (1985).
168. *Id.*
169. *Id.*
170. *See, e.g.*, Albert & Dabbs, *supra* note 64, at 265-70.

but still theoretically able to maintain limited eye contact when jurors looked away from the witness.

Given the locations that were tested, the results suggest that proximity to the jury affected jury perception of lawyer performance. Results also suggest, particularly as shown between Quadrants II and IV, that the ability to see the lawyer affected juror perception of his or her performance. The fact that jurors selected lawyers in Quadrant IV over lawyers in Quadrant II gives rise to the possibility that while lawyers located in Quadrant II were more proximate to the jury than their counterparts in Quadrant IV, the inability of the jury to see the lawyer negated the benefit of greater proximity.

Similarly, the significantly higher individual ratings of lawyers located in Quadrant I and the fact that jurors consistently selected lawyers located in Quadrant I over their opponents in other quadrants suggest that greater proximity coupled with eye contact enhances both verbal and nonverbal communication between the lawyer and jury, further affecting juror perception of the lawyer during trial.

VII. CONCLUSION

The results of this study show, notwithstanding the cause, that location of the lawyer affects jury perception of his or her performance. Lawyers are rated more highly and are more frequently selected when standing in Quadrant I, over lawyers located elsewhere.

If it is true that this phenomenon is a result of increased proximity of the lawyer to the jury, and, that the ability of the jury to see the lawyer is of similar significance, lawyers may be advised to abandon some aspects of courtroom movement in favor of more proximate and highly visible locations. However, the results of the study show only that jurors rated individual performance more highly and selected lawyers more frequently in response to specific questions. The study does *not* indicate whether such locations are or should be *preferred* over locations where attorneys were rated less highly or chosen less frequently. Thus, while there might be a natural tendency to *assume* that lawyers who are identified as "more powerful" or "more commanding" are better "trial lawyers" or are more persuasive, this conclusion cannot be drawn from the instant study. Based on these results alone, it may be equally well said that trial lawyers should abandon the *more proximate* locations for those less proximate and less visible.[171]

171. The results of the jury verdict agree. The most significant finding shows that when *defense lawyers* appeared in Quadrant III, jurors almost uniformly found the defendant *not guilty*. Conversely, when the *prosecution lawyers* appeared in Quadrant

In sum, this study establishes the fact that a lawyer's location in the courtroom affects jury perception of his or her performance. Further study is required to determine the parameters and effects of this finding. Such study may well address the question, whether multiple locations in the courtroom affect juror perception, thus addressing movement *per se*. Here, lawyers remained in their respective locations eighty-four to eighty-nine percent of the trial time. A future study may expand upon this finding, placing lawyers in two distinct locations, and limiting movement between them so that a jury is faced with lawyers positioned in two locations during trial.

Similarly, future studies may position lawyers in the same location but require, during respective presentations, specific numbers and types of movements, increasing movement in one lawyer and decreasing or requiring no movement of the other. Variations of this study may involve increasing or decreasing the proximity of the lawyer to the jury, thus adding increasing or decreasing lengths of time at set distances from the jury as another variable.[172]

James Herman advocates that lawyers "cheat out" to the jury, thereby enabling the lawyer to "be as open . . . and as strong as possible" toward the jury.[173] In effect, he refers to individual orientation to or away from the jury. Future study focusing upon the effect of individual body stance or orientation may be coupled with global studies related to orientation of courtroom participants in their fixed locations—the orientation in the courtroom of the witness stand to the jury box. The finding that location *per se* affects juror perception of lawyer performance implies that form and shape of physical spaces or locations in the courtroom may also affect perception. Because of the physical configuration of the courtroom, a lawyer may be forced to stand in a less proximate location in one courtroom, while a colleague can locate nearer the jury in another courtroom, thus raising the question of whether, in two like trials, the design of the facility itself contributes to the outcome.[174] Future study

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IV, jurors tended to find the defendant *guilty of 2nd degree manslaughter*. No finding was made, on average, of *guilt of 1st degree murder*. Thus, correlation is at best found when counsel is located in the *far* quadrants. The significance of this result cannot be fully assessed in light of the data collected here.

172. This is particularly important in light of several studies which show that maximum jury attention to a speaker peaks at about twenty minutes.

173. Herman, *supra* note 31, at 22.

174. In recent years, court planners have participated in a process of courtroom renovation and design, creating a variety of differing courtroom configurations, among them the famed "courtroom-in-the-round." For a further discussion of issues raised by

directed to this question may involve re-arrangement of the location of the jury box and witness stand in a variety of patterns, examining the question whether such changes produce discernable effect on juror perception and the outcome of the trial. Architect Allan Greenberg suggests just such a result in his study examining sight-lines and angles of incidence between various courtroom participants, proposing different courtroom configurations designed to reduce the angle by which jurors must turn to see lawyers and witnesses.[175]

Additional experimentation may focus on location keyed to selected aspects of trial, such as direct and cross examination; that is, is a given location *preferred* over another or dependent upon the activity undertaken at selected points during trial. Clearly, experienced trial lawyers urge such a conclusion, yet little, if any study has been undertaken to document the efficacy of such advice.

Finally, because one implication of the instant study raises a question whether proximity of the lawyer to the jury affects jury perception of lawyer performance, the possibility of neutralizing this effect cannot be overlooked. The advent of video technology, including large-screen television and holographic imaging, cannot but raise the question, whether in view of documented nonverbal effects of interpersonal interaction, the jury should not be removed from the immediate presence of the witness and lawyers. Future experiments may involve realtime video or holographic transmission of testimony and evidence to the jury located in a room adjacent to the "in-court" presentation, as compared with an identical trial conducted with the jury seated in traditional fashion. Clearly, technical questions raised by such a proposal would have to be dealt with, but, given current technology and sufficient funding, are not beyond capability of study.

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changes in the design of the traditional American courtroom, see Greenberg, *supra* note 38, at 422; C. Theodore Larson, *Future Shock Hits the American Courthouse: Opportunities and Parameters for Design*, 64 AM. INST. ARCHITECTURE J. 36 (1975).

175. GREENBERG, *supra* note 130, at 45.